C.S. KHIN DEVELOPMENT SDN. BHD.

v.

CHUNG YOKE ONN

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 119 OF 1984]
6 APRIL 1985

CONTRACT: *Breach of contract - Pre-incorporation contract - No ratification - Whether null and void - Plea that claim statute barred.*

The respondent was orally engaged in 1962 as an architect for the development of the land known as Lot No. 447, off Jalan Birch, Kuala Lumpur at an agreed fee of 3½% of the construction costs. The initial plans for the site were abandoned owing to poor response of sales. The respondent was told to submit new plans on 5 November 1970. The project was completed in 1981. The respondent claimed for the balance of his professional fees *inter alia* for the works done on the abandoned project. The appellant contended that the abandoned project was a pre-incorporation contract and since there had been no ratification by the appellant it was null and void. The appellant also pleaded limitation.

Held:

[1] Before the project was abandoned the appellant was incorporated and took control of the development of the land. It continued to retain the respondent's services and even held him out to be its architect when it sent him to Hong Kong with a letter to its printers. Payments were made to the respondent intermittently. Hence the appellant was liable to pay the balance of the fees for the abandoned project.

[2] The appellant had, by certain conduct, prevented time from running. As a result, the respondent's claim for the abandonment of the abandoned project was not statute barred.

[Appeal dismissed. Respondent awarded sum claimed with costs and interest at 6% p.a. from date of filing of suit until payment.]

Cases referred to:
Datin Peggy Taylor v. Udachin Development Sdn. Bhd. [1984] 1 MLJ 85; [1984] 2 CLJ (Rep) 7
Oversea-Chinese Banking Corporation Ltd. v. Phillip Wee [1981] 2 MLJ 83

Legislation referred to:
Limitation Ordinance, s. 20

Other source referred to:
Michael Franks on Limitation of Actions, p. 218

For the appellant - K. Anantham; M/s Skrine & Co.
For the respondent - S.Y. Chan (Chan with him); M/s S.Y. Chan

JUDGMENT

Lee Hun Hoe CJ (Borneo):

This appeal is against the decision of the learned Judge. The respondent/plaintiff is an architect. In 1962 he was appointed architect for the appellant/defendant by the late Choo Thiam Khin (deceased) and commissioned to submit plans for the development of the land known as Lot No. 447, Off Jalan Birch, Kuala Lumpur at an agreed fee of 3½% of the construction costs. At the time the appellant had not yet been incorporated. It was only registered on 26 March 1963. The land was owned by Choo Cheong Khay & Sons Sdn. Bhd. which was formed to develop the land, with the deceased as the managing director and his two brothers Choo Thian Seong (70 years plus) and Choo Thian Choon (80 years plus) as directors. It was a family property. Deceased was also the managing director and his two brothers directors of appellant company. The three brothers and the respondent were personal friends. There was no document to formalise the respondent's appointment as architect. Whatever instructions he received from the deceased were made orally based on trust and friendship that he had with the three brothers. Also, the respondent knew about their financial position. They had the land but not the finance. It was arranged that they would pay him when they received money from the purchasers. It was on the basis of payable whenever available. He had therefore not asked for his fees during the period when they were in financial difficulty.

The respondent had explained that he did not press for payment of his fees as he was aware that the appellant was facing great financial problems in developing its various projects. It is not in dispute that in 1975 the respondent lent RM70,000 to Choo Thian Seong, one of the surviving directors of the appellant to assist in the completion of Bangunan Choo Cheong Khay. As the appellant had no fund to make repayment of the loan Choo Cheong Khay & Sons Sdn. Bhd. repaid the loan in 1977. The appellant also experienced great financial difficulty to complete Wisma Mirama as after the death of the deceased in 1974 the money promised by Lee Wah Bank was withdrawn. Later, Citibank made the appellant a loan of RM6 million for the Wisma Mirama project.

In October 1962 he submitted plans for 2 blocks of 13-storey flats comprising 88 flats in each block with arcades on the first 2 floors. Each flat was about 2,420 square feet in size. The total number of flats in the 2 blocks was 176. The plans were approved by the Municipality on 18 November 1963 and the architectural plans were approved on 1 March 1965. The proposed flats were offered for sale but the response was very poor. The appellant decided to send the respondent to Hong Kong to arrange for printing of 2000 coloured brochures to promote the sale of the flats. That was in December 1965. As authority the appellant gave the respondent a letter addressed to Yee Tin Tong Printing Press Ltd., Hong Kong introducing him as their architect with full authority to act and discuss about the printing of the brochures. The coloured brochures distributed to the public also did not produce good response. The flats were too large and too expensive. The project was eventually abandoned.

Deceased then asked the respondent to submit fresh plans for development of Lot 447 on 5 November 1970. The plans were for the construction of 2 blocks of 20-storey flats consisting 280 units to be called Bangunan Choo Cheong Khay and one block of 4-storey shopping arcade which was later known as Wisma Mirama. The plans were approved in 1972. Amendments were made to the approved plans. Another storey was added to Bangunan Choo Cheong Khay increasing the number of flats to 288 units and the addition of 4

penthouses. A tower office block was added to Wisma Mirama. The fees for these projects were also 3½% on the construction costs. Construction on both projects began in 1972. Bangunan Choo Cheong Khay was completed in early 1975. Temporary certificate of fitness was issued on 27 August 1975 and the final certificate of fitness for occupation on 4 February 1981. Wisma Mirama was completed in early 1976. Temporary certificate of fitness was issued on 20 March 1976 and the final certificate of fitness for occupation on 10 April 1981.

The respondent claims for the balance of his professional fees for the works done on the three projects in the sum of RM396,883.74. The sum is calculated as follows:

I. Abandoned project of 176 units Estimated costs RM9,793,000 2/3 of 3 1/2% of RM9,793,000	=	228,500.00
II. Bangunan Choo Cheong Khay Estimated costs RM8,667,000 3½% of RM8,667,000	=	303,345.00
III. Wisma Mirama Estimated costs RM7,764,821.21 3½% of RM7,764,821.21	=	271,768.74
		803,613.74
Less payment received	383,000.00	
		420,613.74
Agreed deduction for fee on bowling equipment	23,730.00	
Balance due		396,883.74

The appellant denied liability on the abandoned project. It was contended that the contract between the appellant and the respondent was a preincorporation contract and since there had been no ratification by the appellant it was null and void. It was further contended that if the appellant was liable the appellant pleaded limitation. As for the fees due on Bangunan Choo Cheong Khay and Wisma Mirama the appellant admitted liability to the extent of RM136,466.35.

The respondent was aware that the appellant was not in existence at the time but he trusted the deceased and his two brothers. He still considered the appellant liable for his fees on the abandoned project. He wrote to Choo Cheong Khay & Sons. Sdn. Bhd. hoping to get a confirmation that they would pay if the appellant refused to pay. However, Choo Cheong Khay & Sons Sdn. Bhd. rejected his claim. These matters arose only after the death of the deceased. To support his claim against the appellant the respondent pointed out that the appellant informed him that the appellant wanted to purchase the project and asked him to value the land which he did as their architect. That was sometime in May 1965. It was only after May 1965 that the appellant introduced the respondent as their architect for the project when they sent him to Hong Kong to buy coloured brochures. Although Choo Cheong Khay & Sons Sdn. Bhd. were the owners and the appellant the developers, fees had been paid by the appellant. The respondent had receipts to substantiate his allegation.

The learned Judge pointed out quite rightly that in 1962 deceased as the managing director of Choo Cheong Khay & Sons Sdn. Bhd. and his two brothers as directors were in complete control of the family business. When the appellant was formed he was also the managing director and again with his two brothers as directors and they were in complete control of the appellant. The appellant was formed solely to overcome some complex tax problems arising from the family's large property dealings in Choo Cheong Khay & Sons Sdn. Bhd. As to the

allegation that the respondent had agreed to forego his fees on the abandoned project since he was retained for the Bangunan Choo Cheong Khay and the Wisma Mirama projects the learned Judge gave no weight to it.

The respondent calculated his fees on the abandoned project based on the valuation report (P. 120) prepared by Messrs. Langdon, Every and Seah, a firm of Quantity Surveyors. Nicholas Chong Ngian Siong (PW2), a partner of Messrs. Langdon, Every and Seah gave evidence. He said the deceased instructed him to prepare the estimate and he did so. The estimate for Wisma Mirama was prepared on the instruction of Citibank to enable Citibank to work out the disbursement to be made towards a loan to be given to the appellant. He made clear that the architect's fees could be based on a quantity surveyor's estimate for abandoned works. Therefore, an architect could use (P. 120) for calculating his fees. On the question of fees the learned Judge observed at p. 63 of the appeal record as follows:

> ... It suffices for me to say that the plaintiff can rely on P. 120 to base his calculation of his fees on the abandoned project and accordingly on the formula of 2/3 of 3½% x RM9,793,000,00, the plaintiff's fee on the abandoned project comes to RM228,500.

In *Datin Peggy Taylor v. Udachin Development Sdn. Bhd.* [1984] 2 CLJ (Rep) 7 the Court considered that the "Pertubohan Akiteck Malaysia" (PAM) guidelines should be imported because they reflected the custom or practice of the profession of the architects and could be relied upon or could be called in aid when the contingency of abandonment was not provided for in any agreement. In such a situation the Court took the view that it was right to take into account the prevailing practice of the architectural fraternity in order to give business efficacy to the contract of employment where the architect through no fault of his own had to cease his professional duties.

Before the 176 units of flats project was abandoned the appellant was incorporated and took control of the development of the land. It continued to retain the respondent's services and even held him out to be its architect when it sent him to Hong Kong with a letter to the printers in Hong Kong. The first payment of RM10,000.00 was made to the respondent under receipt No. 621 dated 22 April 1963 (P. 122) and the second payment of another RM10,000 was made *vide* receipt No.829 dated 28 September 1965.

On the question of limitation the respondent contended his services were retained continuously for all three projects. There is in effect one entire contract to govern all contractual obligations. Therefore, the Statute of Limitation does not apply. This contention was rejected by the learned Judge. Although he had a general retainer with the appellant his fees were based specifically on each project separately. The learned Judge considered the claim for the abandoned project statute barred as the project was abandoned on the day the respondent submitted fresh plans for development of the land. However, the learned Judge considered that evidence showed that the appellant had, by certain conduct, prevented time form running. The appellant made three payments to the respondent. First was RM10,000 on 28 September, 1965. Second was RM20,000 on 7 February 1972 and third payment of RM10,000 on 7 December 1976. No account was kept to explain these payments. There was an earlier payment of RM10,000 made on 22 April 1963 being first payment for blocks 9 and 11. The learned Judge held that the three payments prevented the limitation period from running and that the time only started to run after the last payment on 7 December 1976. As a result the respondent's claim for the abandonment of the abandoned project has not been statute barred.

In *Oversea-Chinese Banking Corporation Ltd. v. Phillip Wee* [1981] 2 MLJ 83 the issue before the Court was whether the plaintiff's claim was statute barred. The defendant wrote to the plaintiff a letter dated 14 January 1974 requesting for postponement of the application

to a later date to enable him to raise money to pay the plaintiff. Mohamed Zahir J held that the defendant's letter revived the time for suing by the plaintiff and that time started to run afresh. In the course of his judgment at p. 84 he referred to Michael Franks on Limitation of Actions at p. 218 and stated:

> With regard to liquidated claims the defendant must expressly or by implication admit that the claim is at that time existing, due and unpaid, but it is not necessary that the acknowledgment should actually name the sum, if the debt can be connected with the acknowledgment by positive evidence or inference.

In an earlier case *Bian Chiang Bank Bhd. v. Kwong Hing Cheong* involving the Sarawak Limitation Ordinance the question of limitation was raised. In that case the respondent had an overdraft account with the appellant bank. The amount was opened in May 1962 and on 31 December, 1971 the account stood at RM10,272.24. The respondent paid various sums into the account, the last payment being for RM100 on 15 December 1969. The appellant demanded payment by notice in writing on 15 December 1971. When the demand was not met the appellant commenced action on 9 February 1972. The respondent pleaded limitation. In allowing the appeal this Court held that on a proper interpretation of s. 20 of the Limitation Ordinance it did not appear to be a matter of much importance if the payment which would make for a new period of limitation was towards interest only or towards part of the capital. If there was such a payment, it would revive the time for suing. In that case I stated at p. 194 that:

> ... There is no evidence to show the payment made by the respondents was to meet any particular item. It seems to me that by making a payment generally on account the respondents made it on account of the whole of his indebtedness. In other words, the payment was on account of the balance outstanding and due at the date of payment ...

The authorities appear to support the learned Judge. We are of the view that the learned Judge was right in rejecting the plea of limitation.

The only objection to the claims in respect of Bangunan Choo Cheong Khay and Wisma Mirama is the amount. On the evidence the learned Judge was satisfied that the respondent had proved the quantum of his fees on all the projects. The appellant however had not come out with the actual costs of construction so that the respondent's calculations could be compared and determined. In the light of the evidence the learned Judge rightly concluded that the appellant had not done so because the actual costs must be more than the estimated costs relied upon by the respondent in calculating his fees. It is pertinent to refer to her remarks at p. 69 of the appeal record when she said:

> ... In this respect, the defendant has not been very honest in its dealings with the plaintiff and for that matter too, is most reluctant to get the surviving brothers of the deceased to testify in Court ...

The result is that the learned Judge gave judgment for the respondent in the sum claimed in the amended statement of claim, that is, RM396,883.74 with costs and interest at the rate of 6% per annum from the date of filing of the suit until payment. For reasons given we would dismiss the appeal with costs. Deposit to the respondent on account of taxed costs.

Also found at [1985] 2 CLJ 345